

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FREDERICK LOUIS WARD,

Plaintiff,

vs.

MICHAEL O'ROURKE, *et. al.*

Defendants.

3:12-cv-00035-LRH (WGC)

**REPORT & RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. Before the court is Plaintiff's pro se Complaint (Doc. # 1-2)¹, and his application for leave to proceed in forma pauperis (Doc. # 1).

I. APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

A person may be granted permission to proceed in forma pauperis if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1). "[T]he supporting affidavits [must] state the facts as to the affiant's poverty with some particularity, definiteness, and certainty." *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (per curiam) (citing *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). The litigant need not "be absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. du Pont De Nemours & Co.*, 335 U.S. 331, 339 (1948).

¹ Refers to court's docket number.

1 Plaintiff indicates that he currently receives \$842.00 per month in disability insurance
 2 payments, and \$167.00 per month in food stamps. (Doc. # 1 at 1-3.) His monthly expenses
 3 total \$845.00, and include the following: (1) \$600.00 for rent; (2) \$148.00 for electricity; (3)
 4 \$41.00 for water; (4) \$27.00 for a disabled bus pass; (5) \$29.00 for prescriptions. (*Id.* at 2.)
 5 In addition, Plaintiff has debt in the amount of \$908.00. (*Id.* at 2.)

6 Based on the information contained within his application, the court finds it is unlikely
 7 Plaintiff would be able to pay the \$350 filing fee given his monthly income and expenses.
 8 Therefore, Plaintiff's application to proceed in forma pauperis (Doc. # 1) should be granted.

9 **II. SCREENING**

10 **A. Standard**

11 Applications to proceed in forma pauperis are governed by 28 U.S.C. § 1915, which
 12 "authorizes the court to dismiss an IFP action that is frivolous or malicious." *Franklin v.*
 13 *Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984) (citing 28 U.S.C. § 1915(a) (citing 28 U.S.C. §
 14 1915(d)). This provision applies to all actions filed in forma pauperis, whether or not the
 15 plaintiff is incarcerated. *See Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc);
 16 *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

17 28 U.S.C. § 1915 provides: "the court shall dismiss the case at any time if the court
 18 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim
 19 upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is
 20 immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). Dismissal of a complaint for
 21 failure to state a claim upon which relief may be granted is provided for in Federal Rule of
 22 Civil Procedure 12(b)(6), and this court applies the same standard under Section 1915(e)(2)
 23 when reviewing the adequacy of a complaint or amended complaint. Review under Rule
 24 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
 25 F.3d 719, 723 (9th Cir. 2000).

26 A complaint must contain more than a "formulaic recitation of the elements of a cause
 27 of action;" it must contain factual allegations sufficient to "raise a right to relief above the
 28

speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 235-36 (3d ed. 2004)). In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint in question, *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Allegations in pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers, and must be liberally construed. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*); *see also Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

B. Plaintiff’s Complaint

Plaintiff has filed this action pursuant to 42 U.S.C. § 1983. (Doc. # 1-2 at 1.) Plaintiff has named attorney Michael O’Rourke and Shook & Stone Attorneys at Law as defendants. (*Id.* at 2.) Plaintiff’s Complaint includes three claims for legal malpractice and misconduct relating to an attorney-client relationship. (*Id.* at 4-6.)

C. Analysis

“To sustain an action under Section 1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right.” *Wood v. Ostrader*, 879 F.2d 583, 587 (9th Cir. 1989). Section 1983 does not provide a cause of action for violations of state law. *See Galen v. County of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007).

A § 1983 lawsuit requires state action. Plaintiff has only named a private individual and law firm as defendants in this action. Accordingly, Plaintiff fails to state a § 1983 claim, and his action should be dismissed.

III. RECOMMENDATION

IT IS HEREBY RECOMMENDED THAT:

(1) Plaintiff's request to proceed in forma pauperis (Doc. # 1) be **GRANTED**. The Clerk of the Court should be instructed to **FILE** the Complaint (Doc. # 1-1). The movant herein should be permitted to maintain this action to conclusion without the necessity of prepayment of fees or costs or the giving of security therefor. This order granting in forma pauperis status should not extend to the issuance of subpoenas at government expense.

(2) The action be **DISMISSED WITH PREJUDICE**.

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District Court's judgment.

DATED: April 30, 2012.



WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE